



U.S. Citizenship
and Immigration
Services

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MAR 02 2004

FILE:

Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a General Manager at an annual salary of \$36,000. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, counsel requests that Citizenship and Immigration Services (CIS) consider the depreciation deducted from the petitioner's gross income.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), provides for the granting of preference classification to skilled workers or members of the professions.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In order to establish eligibility in this matter, the petitioner must demonstrate its ability to pay the wage offered as of the time the priority date is established until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is April 27, 2001. The beneficiary's salary as stated on the labor certification is \$36,000 annually.

In response to the director's request for additional documentation, the petitioner submitted a Form 1120 U.S. Corporation Income Tax Return for the tax years ending 2001 and 2002 that contained the following information:

	2001	2002
Depreciation	\$264,161	\$290,507
Net income (loss)	(\$180,291)	(\$149,287)
Current assets	\$97,627	\$118,033
Current liabilities	\$58,967	\$89,282

The petitioner also submitted Forms 941. These forms did not reflect any wages paid to the beneficiary.¹

¹ The Forms contain an employee with the same last name and first initial, but the social security number and middle initial are different from the beneficiary's.

The director concluded that the petitioner had not established that it had paid the beneficiary the proffered wage. Further, the director concluded that the petitioner's net losses and assets could not establish its ability to pay the beneficiary the proffered wage.

Counsel argues on appeal that the petitioner deducted large depreciation due to major renovations of the motel and that these funds should not be deducted from the petitioner's gross income in considering whether it has the ability to pay the beneficiary the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Id.* at 1084. The court specifically rejected the argument that the Service (now CIS) should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989); see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305 (9th Cir. 1984)).

Moreover, counsel has submitted no evidence that the petitioner underwent an unusual amount of renovations during 2001 and 2002. Thus, we concur with the director that the petitioner's net income is insufficient to demonstrate that the petitioner has the ability to pay the beneficiary the proffered wage. The petitioner's net current assets were \$38,660 in 2001 and \$28,751 in 2002. While the net assets in 2001 were sufficient to pay the beneficiary the proffered wage, the net current assets in 2002 were not. The petitioner must demonstrate its ability to pay the proffered wage through the time of adjustment. Thus, we concur with the director that the evidence of the petitioner's assets is insufficient.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.